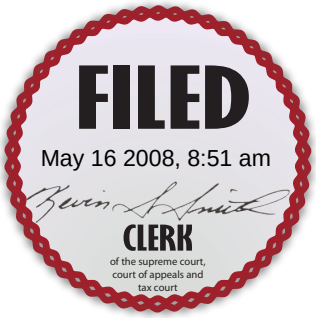

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IN THE
COURT OF APPEALS OF INDIANA

ROBERT WHITEHEAD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0711-CR-970
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Rebekah Pierson-Treacy, Judge
Cause No. 49F19-0708-CM-165723

May 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Following a bench trial, Appellant-Defendant Robert Whitehead appeals his conviction for Class B misdemeanor Disorderly Conduct[1] for which he received a 180-day sentence. On appeal, Whitehead challenges the sufficiency of the evidence to support his conviction. Concluding that this case is another example of the axiom, "We seldom regret words not spoken," we affirm.

FACTS AND PROCEDURAL HISTORY

On August 11, 2007, Indianapolis Metropolitan Police Officer Tracey Ryan responded to a domestic disturbance report at 3138 North Gail Street. Upon arriving Officer Ryan observed Whitehead and Jowana Hogan arguing in the front yard. Whitehead and Hogan were screaming loudly and swearing. Officer Ryan, who was assisted by Officer Brad Boling, separated them and upon doing so observed that they were intoxicated. Whitehead continued to scream and say he did not need police assistance. Both Officers Ryan and Boling told Whitehead to stop yelling. Several neighbors came out of their homes to watch the disturbance. Whitehead continued to yell that he did not do anything wrong, that he did not need police there, that he had not called the police, and that Hogan had created the problem. Whitehead also yelled, "F*** the police."[2] Tr. p. 9. Officer Ryan arrested Whitehead for disorderly conduct.

[1] Ind. Code § 35-45-1-3 (2007).

[2] Officer Ryan's testimony was that "[Whitehead] stated quote, F the police" after Officer Ryan told him to be quiet. Tr. p. 9. During closing argument defense counsel conceded that Whitehead had used expletives after Officer Ryan told him to be quiet. A reasonable inference from this record is that Whitehead yelled "F*** the police."

On August 12, 2007, the State charged Whitehead with disorderly conduct. Following an October 3, 2007 bench trial, the trial court convicted Whitehead and sentenced him to 180 days with 174 days suspended. This appeal follows.

DISCUSSION AND DECISION

Whitehead challenges the sufficiency of the evidence to support his conviction for disorderly conduct by claiming that he did not make unreasonable noise and that he was engaged in protected political speech. Our standard of review for a sufficiency of the evidence claim is well settled. *Blackman v. State*, 868 N.E.2d 579, 583 (Ind. Ct. App. 2007), *trans. denied*. We will affirm the conviction unless, considering only the evidence and all reasonable inferences favorable to the judgment, and neither reweighing the evidence nor judging the credibility of the witnesses, we conclude that no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id.* A mere reasonable inference from the evidence supporting a verdict is enough for us to find evidence to be sufficient. *Id*.

I. Unreasonable Noise

Indiana Code section 35-45-1-3 provides, in pertinent part, that "[a] person who recklessly, knowingly, or intentionally . . . makes unreasonable noise and continues to do so after being asked to stop . . . commits disorderly conduct, a Class B misdemeanor." For purposes of the disorderly conduct statute, noise is unreasonable if it is too loud for the circumstances. *See Johnson v. State*, 719 N.E.2d 445, 448 (Ind. Ct. App. 1999). A loud noise may be found to be unreasonable if it disrupts police investigations. *Id*.

Although Whitehead argues that his noise was not unreasonable, his claim on this point is merely an invitation to reweigh the evidence, which we decline to do. Officer Ryan testified that Whitehead was yelling and screaming, that he continued to do so after being asked to stop by two officers, that he directed an expletive at Officer Ryan, and that he created a disturbance sufficient to cause his neighbors to come out of their houses. We conclude this was sufficient evidence that Whitehead's noise was too loud for the circumstances to sustain his conviction for disorderly conduct.

II. Protected Speech

Whitehead also claims that he was engaged in protected political speech. Article 1, Section 9 of the Indiana Constitution provides, "No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible."

In evaluating whether the State has violated Article 1, Section 9, we employ a two-step analysis. *Blackman*, 868 N.E.2d at 584. First we must determine whether State action restricted a claimant's expressive activity. *Id*. at 584-85. Second, if it has, we

must decide whether the restricted activity constituted an abuse of the right to speak. *Id*. at 585.[3]

With respect to the first prong, Whitehead must demonstrate that the State restricted his expressive activity. Whitehead's conviction for yelling and swearing at police officers during an investigation constitutes the required restrictive State action. *See id*.

With respect to the second prong, when reviewing the State's determination that a claimant's expression was an abuse of the right to free speech under the Indiana Constitution, we generally must find only that the determination was rational. *Id*. However, if the expressive activity that precipitated the disorderly conduct conviction was political in nature, the State must demonstrate that it did not materially burden the claimant's opportunity to engage in political expression. *Id*. An individual's expression which focuses on the conduct of a private party, including the speaker himself, is not political expression. *Id*.

Whitehead's comments, which were that he did not do anything wrong, did not need police, had not called police, and that Hogan was at fault, were focused solely upon his and Hogan's conduct. These comments therefore were not political, so we need only

[3] In *J.D. v. State*, 859 N.E.2d 341 (Ind. 2007), the Indiana Supreme Court omitted any discussion of different analyses of "abuse" depending on whether political or non-political speech is at issue. *J.D.* suggests that any exercise of the freedom of speech, whether political or non-political, will be qualified to the same degree by the phrase "but for the abuse of that right, every person shall be responsible." We therefore agree with Judge Kirsch that *J.D.* appears to tacitly overrule *Price v. State*, 622 N.E.2d 954 (Ind. 1993). *See Blackman*, 868 N.E.2d at 588 (Kirsch, J., concurring). Nevertheless, we analyze Whitehead's argument pursuant to established precedent while we await the Supreme Court's further guidance on this issue.

find that the State's determination that Whitehead's comments were an abuse of his right to free speech was a rational one.

We conclude that it was. The State could have rationally concluded based upon this record that Whitehead's loud and persistent screaming, yelling, and swearing, which caused his neighbors to came out of their houses and onto the street, interfered with Officer's Ryan's attempts to function as a law enforcement officer called to the scene of a domestic disturbance. *See J.D. v. State*, 859 N.E.2d 341, 344 (Ind. 2007) (finding that loud over-talking of police officers is not constitutionally-protected speech).

The judgment of the trial court is affirmed.

BARNES, J., and CRONE, J., concur.